86-983

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

KENNETH J. WEYTKOW,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

DENNIS A. BERKSON
180 North LaSalle Street
Suite 1206
Chicago, Illinois 60601
(312) 726-7402

Attorney for Petitioner

The Scheffer Press, Inc.—(312) 263-6850

23 pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE APPELLATE COURT ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION TO QUASH SEARCH WARRANT AND SUPPRESS EVIDENCE, WHERE THE APPELLATE COURT FAILED TO APPLY THE STANDARD OF WHETHER THE POLICE OFFICERS SHOULD HAVE KNOWN THAT THE BUILDING WAS NOT A ONE-FAMILY HOME AND INSTEAD HELD THAT THE INDICATIONS THAT THE HOME WAS NOT A SINGLE FAMILY WERE NOT "CONCLUSIVE" AND THAT THE OFFICERS' ACTIONS WERE NOT SO UNREASONABLE SO AS TO INVALIDATE THE SEARCH OF DEFENDANT'S RESIDENCE.

TABLE OF CONTENTS

Table Of Authorities

Constitutional Provisions

Table Of Cases

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

No.

KENNETH J. WEYTKOW,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

OPINIONS BELOW

The Supreme Court of Illinois, on October 2, 1986, denied Petitioner's Petition for Leave to Appeal. See Appendix "A", infra, page 6(a). The opinion of the Appellate Court of Illinois, First District, is contained in Appendix "A" hereto, infra, page 1(a).

JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to Title 28, United States Code, Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

The Defendant, KENNETH WEYTKOW, was charged with possession of a controlled substance with intent to deliver in Information No. 84-I-469. After a bench trial before the Honorable Michael P. Toomin, KENNETH WEYTKOW was found guilty of possession of a controlled substance with the intent to deliver. (R. 120)

The following evidence was adduced by stipulation pursuant to Defendant's Motion to Quash Search Warrant and Suppress Evidence:

On October 4, 1983, a search warrant was issued that commanded Detective Martin to search "Kenneth, Male White, 30 to 33 years, six foot, 160, blond hair, at 14248 South Kostner, Crestwood, Illinois, a house, and to seize . . ." a controlled substance. On October 4, 1983, at 8:15 p.m., certain members of the Chicago Police Department approached the residence at 14248 South Kostner and rang the bell at the front door. A female, later learned to be Susan Weytkow, wife of the Defendant, came to the door. Police officers displayed the search warrant to Susan Weytkow and she refused to open the door. Minimal force was used by the police officers to gain entry. When police officers entered the residence, they found Susan Weytkow and her six-month old baby present in the house. (R. 6-7)

It was further stipulated that Defendant's Exhibit Number 1 would be a photograph of the kitchen area of the second floor apartment. Defendant's Exhibit Number 2 would be a photograph that depicts the door which the officers gained entry from the inside of the first floor apartment into the second floor apartment. Defendant's Exhibit Number 3 represents a room inside of an unattached garage which has two rooms. Defendant's Exhibit Number 4 depicts another room in the unattached garage. (R. 9) Defendant's Exhibit Number 5 depicts said unattached garage. Defendant's Exhibit Number 6 depicts the front door of the building. Defendant's Exhibit Number 7 depicts the rear stairs of the building which lead to the second floor. Defendant's Exhibit Number 8 depicts the rear of the building, the stairs to the second floor, the second floor door and the side door. (R. 10) Defendant's Exhibit Numbers 9 and 10 depict the rear of the building. Defendant's Exhibit Numbers 11 and 12 depict the front of the building and two mailboxes in front of the building on the street. (R. 11, Supp. R. 5-8)

It was further stipulated that the building contains two apartments which are structurally subdivided inside. There is a doorway inside of the building that leads to the second floor apartment which the officers forced open to gain entry into the second floor apartment. (R. 12) That while searching the first floor apartment, police officers found Defendant's Exhibit Number 13, which depicts a telephone bill made out to Kenneth Weytkow for the "first floor apartment, 14248 S. Kostner." (R. 12-13)

It was further stipulated that if Judith Michau were called to testify, she would testify that on October 4, 1983, and for two years previous, she resided at 14248 S. Kost-

ner, Crestwood, Illinois, floor two, and the Defendant did not. That her telephone bill, Defendant's Exhibit Number 14, is addressed "floor two at 14248 Kostner Avenue, Crestwood, Illinois." (R. 13-14)

It was further stipulated that the officers found on the first floor, certain evidence which is the subject of the motion. (R. 14-15)

The officers also searched the unattached garage and recovered certain evidence which the State also intended to use. Both the occupants of the first and second floor of the building have keys to the garage and access to the use of said garage. (R. 15)

It was further stipulated that the officers arrived at the building on October 4, 1983, at 8:15 p.m. That a number of officers searched the building for two hours or until approximately 10:00 p.m. The Defendant was not present. After the two-hour period, certain officers left the premises. However, three officers remained in the premises until October 5, 1984, at 3:30 p.m. The officers left after receiving a telephone call from the Defendant's attorney. (R. 16-17)

It was further stipulated that if Officer Martin were called to testify, he would testify that at the time the search warrant was being executed, he believed that the building was a single-family residence. (R. 17-18) The only information the officers had about the structure was from the confidential informant. (R. 18)

It was lastly stipulated that the building in question has three exterior doors. (R. 19)

The trial court denied the Motions to Quash and Suppress. (R. 55)

After a stipulated bench trial, the Defendant was found guilty of possession of a controlled substance with intent to deliver. After a hearing in aggravation and mitigation, the Defendant was sentenced to six years in the Illinois Department of Corrections. (R. 130)

Subsequent to his conviction, Defendant timely filed an appeal in the Appellate Court of Illinois. The issue on appeal was whether the trial court erred in denying the Defendant's Motion to Quash Search Warrant and Suppress Evidence where the search warrant described the place to be searched as a house, when in fact the building contained two apartments which are structurally subdivided. Defendant contended that the warrant and search were violative of the Fourth Amendment. In affirming the Defendant's conviction, the Appellate Court held that although the police officers could have investigated the nature of the building more thoroughly, both in obtaining the search warrant and when they arrived, the two mail boxes in front of the house were not "conclusive" as to the existence of two apartments inside the building, nor were the officers' actions so unreasonable as to invalidate the search of Defendant's residence. Defendant's Petition for Leave to Appal to the Illinois Supreme Court was denied.

REASONS FOR GRANTING WRIT

THE APPELLATE COURT ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION TO QUASH SEARCH WARRANT AND SUPPRESS EVIDENCE, WHERE THE APPELLATE COURT FAILED TO APPLY THE STANDARD OF WHETHER THE POLICE OFFICERS SHOULD HAVE KNOWN THAT THE BUILDING WAS NOT A ONE-FAMILY HOME AND INSTEAD HELD THAT THE INDICATIONS THAT THE HOME WAS NOT A SINGLE-FAMILY WERE NOT "CONCLUSIVE" AND THAT THE OFFICERS' ACTIONS WERE NOT SO UNREASONABLE SO AS TO INVALIDATE THE SEARCH OF THE DEFENDANT'S RESIDENCE.

The Appellate Court's decision to affirm the Trial Court's denial of the Defendant's Motion to Quash Search Warrant and Suppress Evidence was based on the premise that the indications that the residence was not a single-family dwelling were not "conclusive" and that the officers' actions were not so unreasonable as to invalidate the search of the Defendant's residence.

The law is clear that a search warrant, to be valid, must particularly describe the place to be searched. The Fourth Amendment of the United States Constitution provides in pertinent part that "no Warrant shall issue, but upon probable cause . . . and particularly describe the place to be searched." Federal courts have consistently held that the Fourth Amendment's requirement that a specific "place" be described when applied to dwellings refers to a single unit (the residence of one person or family). Thus, a warrant which describes and entire building when cause is shown for searching one apartment is void.

United States v. *Hinton,* 219 F.2d 324 (7th Cir. 1955), *United States* v. *Higgins,* 428 F.2d 232 (7th Cir. 1970). In *United States* v. *Hinton, supra* at 325-326, the court held that:

> "For purposes of satisfying the Fourth Amendment, searching two or more apartments in the same building is no different than searching two or more completely separate houses. Probable cause must be shown for searching each house, or in this case, each apartment. If such cause is shown there is no reason for requiring a separate warrant for each resident. A single warrant may cover several different places or residences in a single building. But probable cause must be shown for searching each residence unless it be shown that, although appearing to be a building of several apartments, the entire building is actually being used as a single unit."

Therefore, in order for a search warrant to be valid, the warrant must particularly describe the specific place to be searched, so as to identify the specific place or unit for which there is probable cause to believe a crime is being committed.

In the instant case, the search warrant commanded the search of "Kenneth . . . at 14248 S. Kostner, Creswood, Illinois, a house . . ." (R.7) It is thus clear that the warrant commanded the search of the entire building located at 14248 S. Kostner. Further, it is unrebutted that the building in question in fact contained two apartments which are structurally subdivided. (R. 12)

The next question which must be resolved in determining whether a warrant meets Fourth Amendment criteria is whether the officers should have been put on notice as to the multi-family character of the building subject to the search. See *People* v. *Thomas,* 70 Ill.App.3d 459, 388 N.E.2d 941 (1979). In *United States* v. *Esters,* 366 F. Supp. 214 (E.D. Mich. 1972), a search warrant was is-

sued for the two-story structure located at 4637 Newport. There was no indication in the warrant as to whether the building was a single or multi-family residence. The court held that the test to be applied in such a situation was "not whether the officers had actual knowledge, but the test is whether they should have known that the building was not a one-family home." *Id.* at 219. In *United States* v. *Votteller,* 544 F.2d 1355 (6th Cir. 1976), the Sixth Circuit Court of Appeals in quashing a search warrant for failing to describe the particular place to be searched, also employed the objective test enunciated in *Esters.* Thus, it appears that the prevailing position of the lower courts is to employ an objective standard to determine whether police officers were on notice as to the multi-family character of the building. Therefore, the test is not whether the officer actually knows, but rather, whether the officer acting as a "reasonable man," should have known of the multi-unit nature of the building subject to a search warrant.

In the instant case, the building in question has three exterior doors. One of the doors is in the front, the second on the side, and the third in back on the second floor, just a few feet away from the second door on the side. (Supp. R. 6-8) The front door states "1st" in a clearly visible style. (Supp. R. 6) As the stairway to the second floor is approached, the phrase "2nd" is immediately visible on the right post of the stairway. (R. 7) Moreover, the stairway leading to the second floor door, and the door itself, indicates more than an additional means of access to a single-family home. The second floor door is only a few feet from the side door, and has the appearance of a primary entrance way. (Supp. R. 7-8) Further, two doors, rather than three, are common to most single-

family dwellings. Perhaps the most important indication of the multi-family nature of the building lies in the fact that at the street, next to the house, are two separate rural-style mailboxes. (Supp. R. 8)

It is thus clear that based on the outward appearance of the building alone, *especially the two mailboxes located next to the building,* the officers *should have known* the building was a multi-family residence. *United States* v. *Esters, supra.*

In confronting the exterior appearance of the house, the Illinois Appellate Court stated:

> ". . . the building generally appeared to be a single-family residence; the two mailboxes were not conclusive of the existence of two apartments inside the building, especially where there were not also, for example, two separate exterior front entrances, or two doorbells or utility meters." (App.Ct.Op. at 3-4)

The Appellate Court thus chose to ignore the fact that the building in fact had three separate entrances, including a front entrance which stated "1st" and a rear entrance which stated "2nd," in favor of what the building did not have.

However, most significant in the Appellate Court's holding was the statement that: "*the two mailboxes were not conclusive* of the existence of two apartments inside the building . . ." [emphasis added] As previously stated, the law is whether the officers *should have known* the multi-family nature of the building, not whether the appearance of the house was *conclusive* as to the multi-family nature of the building. The "conclusive" standard applied by the Appellate Court is not consistent with the Fourth Amendment, and for all intents and purposes, erases any duty of police officers to obtain a search warrant that particularly describes the place to be searched.

It is further clear that if the officers would have checked the utilities for the building, as is common police procedure, they would have found the telephone service at the building in question was registered separately to Kenneth Weytkow, 1st floor apartment and Judith Michau, Floor 2. (R. 13-14) Such a utility check should have been performed by the police officers which would have given them knowledge that the building was not a one-family home. The Appellate Court appears to have agreed with this, stating:

> "We do agree that the police could have investigated the nature of the building more thoroughly, both in obtaining the warrant and when they arrived." (App. Ct.Op. at 4)

It should be further noted that the above-quoted portion of the Appellate Court opinion seems to indicate that the Appellate Court believed that the police officers should have known the multi-family character of the building to have necessitated the further investigation suggested by the Appellate Court.

Finally, the Appellate Court concluded that the police officers' actions were not "so unreasonable as to invalidate their search of the Defendant's first floor residence." (App.Ct.Op. at 4)

Once again, this appears to derogate the "should have known" standard in favor of still another standard, apparently being "how unreasonable" the officer's actions appear to be.

In support of this new-found standard, the Appellate Court cites *United States* v. *Santore,* 290 F.2d 51 (2nd Cir. 1960) and *People* v. *Thomas,* 70 Ill.App.3d 459, 388 N.E.2d 941 (1st Dist. 1979).

In *Santore,* the Court held that the building in question was to "*all outward appearances* a one-family house. . ." [emphasis added] Moreover, *Santore* did not set forth the reasonableness standard described by the Appellate Court. In *Thomas,* the Court held the search to be proper where the apartment in question was not structurally subdivided. Moreover, in *Thomas,* the Court cited the *United States* v. *Esters* standard of whether the officers should have known the multi-family character of the building. Thus, in the instant case, the Appellate Court refused to apply the very standard set forth in the case they used to allegedly support their decision.

The Petitioner, therefore, asserts that the Appellate Court failed to apply the proper standard to the issue of whether the police officers should have known the multi-family character of the building. That in applying the proper standard, it is clear that the police officers should have known that the building was in fact multi-family, and, therefore, the decision of the Appellate Court affirming the Circuit Court should be reversed.

It appears that there is a need for some direction from this Honorable Supreme Court in this area. Although the lower courts seem to follow the objective test in determining whether officers are on notice as to the nature of a building, the Supreme Court has not established a firm ruling on this issue. Such a ruling from this Honorable Court is necessary to clear up the disparity and eliminate the confusion the lower courts are faced with in this area.

The test this Honorable Court should establish to determine the validity of a search warrant is the objective, reasonable man standard; whether the officers should have known of the multi-family nature of the building. This

test is most consistent with the provisions of the Fourth Amendment, which prohibits "unreasonable searches and seizures." Imposition of such a standard would hold police officers accountable for their actions and for their failure to act. It would force officers to keep their eyes open and not ignore clear, objective criteria which would put them on notice that they may be acting improperly. Therefore, the court should adopt the objective, reasonable man test to determine whether police officers were on notice as to the multi-family character of a building, both at the time a search warrant is being applied for and in the execution of the warrant.

CONCLUSION

Wherefore, Petitioner, KENNETH J. WEYTKOW, prays that a Writ of Certiorari be granted herein.

Respectfully submitted,

.....

DENNIS A. BERKSON & ASSOCIATES, LTD.
180 North LaSalle Street #1206
Chicago, Illinois 60601
(312) 726-7402

Attorneys for Petitioner

APPENDIX

Second Division
April 29, 1986

85-0948

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

KENNETH J. WEYTKOW,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County.
Honorable MICHAEL P. TOOMIN, *Judge Presiding*

ORDER DISPOSING OF APPEAL UNDER SUPREME COURT RULE 23

After a bench trial, the defendant was found guilty of possession of a controlled substance with intent to deliver, and was sentenced to a prison term of six years. On appeal, he contends first that the trial judge erred in denying his motion to quash and suppress because the search warrant's description of his house was inaccurate and the duration of the search was unreasonable; and second, that he was not proved guilty beyond a reasonable doubt.

At the hearing on the defendant's motion to quash the search warrant and suppress the evidence seized, and at trial, the evidence established that based on information

from a confidential informant, the Chicago police had been issued a search warrant for the defendant, who was named and described, and his house, at a specific address in Crestwood, Illinois, to seize cocaine and drug paraphernalia.[1]

When the arresting police officer and his partners arrived at the address at 8 p.m. on October 4, 1983, he believed it was a single-family residence, although he did see two mailboxes on the street, and there were rear stairs leading to the second floor. When the defendant's wife, who had her baby inside, refused to open the door after the warrant was displayed, the police used minimal force to enter; the wife said that the defendant would return from shopping soon. The officers then discovered that the residence was structurally divided inside into two apartments; they also found a telephone bill for the defendant addressed to the first-floor apartment, another addressed to a woman in the second-floor unit, and men's clothing in the first-floor apartment. The officers spent two hours searching both apartments, as well as an unattached garage to which both occupants had access and keys. Although they found nothing in the upstairs apartment, the search of the downstairs apartment disclosed an attaché case and a Pyrex bowl with over 500 grams of cocaine; two scales with traces of cocaine; $34,000 in cash; a gun, ammunition, and brass knuckles; a plastic substance that could be used to cut cocaine; and a flight plotter with the defendant's fingerprints. Another scale and more of the plastic substance were found in the garage. At about 10 p.m., all but three of the officers left; these officers remained until 3:30 p.m. the next day, and

---

[1] The complaint for the search warrant has not been included in the record on appeal.

left when the defendant's attorney notified the police that his client would surrender. On October 6, the defendant was arrested; he asked for the money taken from his house, and gave the address searched as his residence.

We affirm the judgment of the circuit court. In passing, although the defendant has not raised this point, we believe that the search of the unattached garage was improper, and the evidence seized there — the third set of scales, and the drug-cutting substance — must be suppressed. (See *People* v. *Freeman* (1984), 121 Ill. App. 3d 1023, 460 N.E.2d 125.) However, where this minimal evidence was merely duplicative of the substance and scales previously found in the defendant's residence and, as will be discussed below, the search of the defendant's apartment itself also was proper, we uphold the remainder of the trial judge's evidentiary ruling, as well as his finding of guilt beyond a reasonable doubt.

First, while current case law would seem to indicate that the police officers should not have searched the second-floor apartment once they had found the female occupant's telephone bill and realized that the interior of the building was structurally divided into two living units (See 2 LaFave, Search and Seizure sec. 4.5(b), at 78-82 (1978 and 1986 Pocket Supp.)), we do not believe this error affects the validity of the legitimate search of the defendant's apartment, under the facts presented here. This was not a case where the police entered a multi-unit residential building and proceeded to search every unit there in an obvious fishing expedition until they found the unit with the evidence they wanted; the search warrant here clearly named and described the defendant and his "house." Nor do we believe that it should have been readily apparent to the police officers here, until they

actually entered, that the building was a two-unit dwelling. Here, instead, the search warrant gave the officers the right to search the defendant and his house. The evidence indicates that the search of the first-floor unit was reasonable, based upon the informant's statement that mentioned only the ground level of the building, and upon the remarks of the defendant's wife that implicitly or explicitly admitted her husband's identity once the officers had entered. In addition, the building generally appeared to be a single-family residence; the two mailboxes were not conclusive of the existence of two apartments inside the building, especially where there were not also, for example, two separate exterior front entrances, or two doorbells or utility meters. We do agree that the police could have investigated the nature of the building more thoroughly, both in obtaining the warrant and when they arrived. And, as noted above, we further agree that they overstepped their bounds in searching the second-floor apartment and detached garage. However, we do not believe the description in the warrant was so erroneous, or that the officers' actions — in entering the building without further investigation and them searching both the first-floor and second-floor units instead of withdrawing — were so unreasonable as to invalidate their search of the defendant's first-floor residence. See *United States* v. *Santore* (2d Cir. 1960), 290 F.2d 51; 2 LaFave, Search and Seizure sec. 4.5(b), at 78-82 (1978 and 1986 Pocket Supp.). See also *People* v. *Thomas* (1979), 70 Ill. App. 3d 459, 388 N.E.2d 1941.

Similarly, we reject the defendant's argument that because the duration of the search of over 19½ hours was unreasonable, the evidence seized must be suppressed. We note initially that all the evidence was seized during the

first two hours the police were in the defendant's apartment. We further note the absence of any allegations that the police were abusive or disorderly. Given the quantities of drugs, cash and drug paraphernalia uncovered, the presence of the defendant's wife and child, the wife's statement that her husband would be returning, and the weapons and flight matter in the home, we can see reasonable, if not necessarily compelling, reasons for the officers to remain, both to arrest the defendant when he returned and to continue searching. (*Cf. People* v. *Van Note* (1978), 63 Ill. App. 3d 53, 379 N.E.2d 834.) And even if we assume for the sake of argument that the officers acted unreasonably in remaining, we do not believe that suppression of the evidence lawfully seized in the first two hours would be the proper remedy, especially where the police already were authorized to search the defendant's person. See generally, 2 LaFave, Search and Seizure sec. 4.10(d), at 162-163 (1978 and 1986 Pocket Supp.).

Finally, we find no merit in the defendant's claim that he was not found guilty of possession with intent to deliver beyond a reasonable doubt. Rather, the circumstantial evidence of the defendant's guilt was overwhelming, even without the minimal and duplicative evidence erroneously seized in the garage, despite his physical absence from his residence. See *People* v. *Stamps* (1982), 108 Ill. App. 3d 280, 438 N.E.2d 1282; *People* v. *Townsend* (1980), 90 Ill. App. 3d 1089, 414 N.E.2d 483.

Accordingly, the judgment of the circuit court is affirmed.

We also grant the State's request that the defendant be assessed the sum of $50 as costs for his appeal. *People* v. *Nicholls* (1978), 71 Ill. 2d 166, 374 N.E.2d 194.

Dated at Chicago, Illinois, this 29th day of April, 1986.

Stamos, Hartman and Scariano, JJ.

63562

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035
October 2, 1986

Mr. Michael D. Ettinger
Attorney at Law
4237½ West 95th St.
Oak Lawn, IL 60453

No. 63562—People State of Illinois, respondent, v. Kenneth J. Weytkow, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 24, 1986.

(2)

NO. 86-983

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

KENNETH J. WEYTKOW,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN,
Attorney General,
State of Illinois
MARK ROTERT
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601

Attorney for Respondent.

RICHARD M. DALEY
State's Attorney
Cook County, Illinois,
500 Richard J. Daley Center
Chicago, Illinois 60602
THOMAS V. GAINER, JR.,*
TERRY TAKASH,
Assistant State's Attorneys
Of Counsel.

*Counsel of Record.
(312) 443-5496

17pp

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

KENNETH J. WEYTKOW,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE APPELLATE
COURT OF ILLINOIS, FIRST DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN,
Attorney General
State of Illinois,
MARK ROTERT
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601,
Attorney for Respondent.

RICHARD M. DALEY,
State's Attorney of
Cook County, Illinois,
500 Richard J. Daley Center,
Chicago, Illinois 60602,
THOMAS V. GAINER, JR.,*
TERRY TAKASHM
Assistant State's Attorneys,
Of Counsel.

* Counsel of Record
(312) 443-5496

QUESTION PRESENTED FOR REVIEW

Whether the Illinois Appellate Court properly held that the constitutional prohibitions against unreasonable search and seizures requires that when a search warrant mistakenly cites a building as a single-family home, and upon arrival the police officers discover that the building is subdivided into two apartments on the inside of the house, the test as to whether the warrant is valid when the officers search the enitre building is whether the officers should have known that the building was more than a one-family unit when they applied for the warrant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

KENNETH J. WEYTKOW,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

OPINION BELOW

The opinion of the Illinois Appellate Court, First Judicial District, (People v. Weytkow, No. 85-948 (April 29, 1986)), is appended to the petition for a wirt of certiorari as Appendix 1a-5a. The Illinois Supreme Court denied petitioner's Petition for Leave to Appeal on October 2, 1986. A copy of that order is appended to the petition as Appendix 6a.

JURISDICTION

The petition having been timely filed within sixty days of the Illinois Surpeme Court's denial of leave to appeal, entered October 2, 1986, the jurisidiction of this Court is properly invoked under 28 U.S.C. 1257 (3)). However, as treated more fully below, respondent submits that no good reason exits for this Court to exercise its sound judicial discretion and grant the instant petition for a writ of certiorari.

STATEMENT OF THE CASE

Respondent will concur in petitioner's Statement of the Case. (Pet. at p. 2) Any additional facts which are required for a better understanding of the question presented will be included in the argument portion hereof.

REASON FOR DENYING THE WRIT

THE ILLINOIS COURTS PROPERLY HELD THAT THE CONSTITUTIONAL PROHIBITION AGAINST UNREASONABLE SEARCH AND SEIZURES REQUIRES THAT WHEN A SEARCH WARRANT MISTAKENLY CITES A BUILDING AS A SINGLE-FAMILY RESIDENCE, AND UPON ARRIVAL POLICE OFFICERS DISCOVER THE BUILDING IS A TWO-FAMILY RESIDENCE, AND SEARCH THE ENTIRE BUILDING, THE TEST IN DETERMINING WHETHER THE WARRANT IS VALID IS WHETHER THE POLICE OFFICERS SHOULD HAVE KNOWN THAT THE BUILDING WAS MORE THAN A ONE-FAMILY UNIT WHEN THEY APPLIED FOR THE WARRANT.

Petitioner contends that the Illinois Appellate Court, by affirming the trial court's decision to deny the petitioner's motion to quash search warrant, denied the petitioner's Fourth Amendment right to be

free from unreasonable search and seizures. The premise underlying the petitioner's meritless contention is that the Appellate Court applied an improper standard in determining whether the search warrant was valid.

In the case at bar, the search warrant commanded the search of the petitioner and 14248 S. Kostner, Crestwood, a house, to seize, cocaine to wit: a controlled substance, along with any other drug cutting paraphenalia at that residency. Upon arriving at this address the police offiers learned that, from inside, the building had been structurally divided into two apartments. The officers searched both apartments and in the petitioner's apartment they found over 500 grams of cocaine; two scales with traces of cocaine; $34,000 in cash; a

gun, ammunition, brass knuckles, and a flight plotter with the petitioner's fingerprints.

Under these circumstances the Fourth Amendment requires, and the petitioner concedes (Pet. at 7), the test in determining the validity of the warrant is whether the officers should have known that the building was more than a one-family unit when they applied for the warrant. United States v. Esters, (D.C. Mich. 1972), 336 F.Supp. 214, citing Owens v. Scafati, (D.C. Mass 1967), 273 F.Supp. 428, cert. denied, 391 U.S. 969, 88 S.Ct. 2043, 20 L.Ed.2d 883,

However, the petitioner erroneously maitains that the Appellate Court applied a standard which required the police to have actual knowledge that the building was more than a one-family unit when they applied

for the warrant in order to render the warrant invalid. (Pet. at 9-10) The respondent submits that this is a gross misstatement of the Appellate Court's holding.

The Appellate Court's holding clearly revealed that it considered whether the officers should have known the two-unit nature of the building when they applied for the warrant, not whether the officers knew for a fact that the building's interior had been structurally subdivided and contained two apartments.

In considering what the officers should have known, the Illinois Appellate Court stated:

> "...This was not a case where the police entered a multi-unit residential building and proceeded to search every unit there in an obvious fishing

> expedition until they found the unit with the evidence they wanted; the search warrant here clearly named and described the defendant and his "house." Nor do we believe that it should have been readily apparent to the police officers here, until they actually entered, that the building was a two-unti dwelling...." (App. Ct. op. at 3-4)

Thus by expressing that the exterior of the house was not an obvious indication that it was a two-unit dwelling, it is clear that the Appellate Court properly considered whether the officers should have known that the building was more than a one-unit dwelling.

In further discussion of the exterior of the petitioner's house the Appellate Court stated that: "The building generally appeared to be a single-family residence..."

(App. Ct. Op. at 3-4) The court further noted that there were not "two separate exterior front entrances, or two doorbells or utility meters." (App. Ct. Op. at 4)

These statements by the Appellate Court belie the petitioner's claim that the Court improperly considered whether the officers had actual knowledge of the two-unit nature of the building, rather than whether they should have known of the two-unit nature of the building. The Appellate Court's observations of the general exterior of the building clearly demonstrates that the Court was considering whether the outside appearance of the building should have put the officers on notice that the building contained an upstairs apartment.

Additionally, the Appellate Court's citing of United States v. Santore, (2nd Cir. 1960), 290 F.2d 51 and People v.Thomas,

70 Ill. App.3d 459, 388 N.E.2d 1941 (1st Dist. 1979), is further evidence that the Court was aware of, and did indeed apply the proper standard. (Thomas and Santore both expressly held that where a search warrant mistakenly cites a building as a single-family residence, and upon arrival police officers discover that the building is a two family residence, and search the entire building, the test in determining whether the warrant is valid is whether the police officers should have known that the building was more than a one-family unit when they applied for the warrant) 290 F.2d at 67, and 388 N.E.2d at 943.

Thus, it is clear that the petitioner's attempt to gain certiorari claiming that the Illinois Appellate Court applied the wrong Fourth Amemdment criteria must fail. The State of Illinois properly

afforded the petitioner all the protections guaranteed him under the Fourth Amendment.

As the Illinois Appellate Court properly held that the Fourth Amendment requires that when a search warrant mistakenly cites a building as a single-family residence, and upon arrival police officers discover the building is a two-family residence, and search the entire building, the test in determining whether the warrant is valid is whether the police officers should have known that the building was more than a one-family unit when they applied for the warrant, the petitioner is not entitled to a writ of certiorari and the petition must be denied.

CONCLUSION

Wherefore, for all the foregoing reasons the respondent prays that this Honorable Court deny the instant petition for a writ of certiorari.

Respectfully submitted,

NEIL F. HARTIGAN,
Attorney General,
State of Illinois
MARK ROTERT
Assistant Attorney General
100 W. Randolph Street,
12th Floor
Chicago, Illinois 60601,
Attorney for Respondent.

RICHARD M. DALEY,
State's Attorney of
Cook County, Illinois,
500 Richard J. Daley Center,
Chicago, Illinois 60602,
THOMAS V. GAINER, JR.,*
TERRY TAKASH,
Assistant State's Attorneys,
Of Counsel.

* Counsel of Record.
(312) 443-5496